

2012 WL 6838664 (Miss.) (Appellate Brief)  
Supreme Court of Mississippi.

Gary Lamar SMILEY and Mary Ann Smiley, Appellants,

v.

Richard YLLANDER, Margaret Y. Jackson, Lynn Smiley Baker, Dan Smiley,  
Otto Yllander, Linda Y. Toler, Albert Yllander, Jr., Katherine S. Macdonald,  
Robert A. Smiley, III and Mary Helen Smiley Anderson, Appellees.

No. 2011-CA-00593.

March 19, 2012.

Appeal from the Chancery Court of Amite County, Mississippi Honorable Debbra Halford, Presiding

**Brief of Appellees Oral Argument not Requested**

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### **\*1 STATEMENT OF ISSUES**

1. Did the Court err in its' interpretation of the Warranty Deed in favor of Gary L. Smiley and Mary Ann Smiley?
2. Did the Court err in its' determination of the timber harvested?
3. Did the Court err by applying the damages provided in [Section 95-5-10 of the MS Code](#) of 1972, Annotated?
4. Did the Court err in determining the misuse of funds belonging to Martha Jeanette Smiley?

### **\*2 STATEMENT OF THE CASE**

This is a cause of action that was filed by the Appellees against the Appellants dealing with several issues, which included undue influence, the wrongful cutting and removal of timber, and the misappropriation of funds.

The case was bifurcated and an initial trial was started and a settlement for the first phase of the trial was entered. This appeal stems from the second trial, which was to determine damages, if any.

Martha Jeanette Smiley was a retired bank employee. She had no children. Her home and real property is located in Section 26, Township 2 North, Range 2 East, Amite County, Mississippi. She had resided by herself, but was visited by all parties, who are a part of this appeal.

The record is unclear as to why, but sometime in the later part of 2004, Gary Lamar Smiley initiated visits to the home of Martha Jeanette Smiley and later moved in with her. His wife, Mary Ann Smiley, later moved to the home in the early part of 2005.

During the year 2005, numerous events occurred that indicated Gary Lamar Smiley and his wife, Mary Ann Smiley, were exerting their will over an **elderly** and infirm Martha Jeanette Smiley, who was 85 years old and was mainly using a wheelchair and walker to get around.

The chain of events are as follows:

**\*3** 1) During the early part of 2005, Martha Jeanette Smiley conveyed all interest that she owned in and to certain property in the State of Louisiana to Gary Lamar Smiley.

2) On the 23rd day of May, 2005, Martha Jeanette Smiley executed a Durable General Power of Attorney to Gary Lamar Smiley and Mary Ann Smiley, which was duly recorded on the 24th day of May, 2005 in the Amite County Conveyance Records (Ex P-2,RE-42).

3) On the 14th day of October, 2004, a will was signed by Martha Jeanette Smiley leaving Gary Lamar Smiley and wife Mary Ann Smiley the home and 50 acres of land with a general description of the land. All other heirs were to divide the remaining 90 acres of land (Ex P-1,RE-37).

4) On the 28th day of November, 2005, Martha Jeanette Smiley executed a second Durable General Power of Attorney to Gary Lamar Smiley and Mary Ann Smiley, which was duly recorded on the 28th day of November, 2005 (Ex P-3,RE-45).

5) On the 28th day of November, 2005, Martha Jeanette Smiley executed a deed in favor of Gary Lamar Smiley, conveying all the land she owned in Amite County, being 140 acres, more or less in Section 26, Township 2 North, Range 2 East(Ex P-4,RE-52).

**\*4** Simply put, in less than one (1) year Martha Jeanette Smiley, had conveyed all of her real property to Gary Lamar Smiley and Mary Ann Smiley.

Martha Jeanette Smiley died on July 6, 2006, at the age of 86 years. Immediately thereafter, Gary Lamar Smiley and wife, Mary AnnSmiley, preceded to cut the timber on the entire 140 acres of land. Specifically, the 90 acres that was to pass to the Appellees was clear cut.

The verbiage in the deed to Gary Lamar Smiley and Mary Ann Smiley specifically states that Martha Jeanette Smiley is “**trusting**” that the dictates of her Last Will and Testament would be followed.

The question to be answered is whether or not Gary Lamar Smiley understood what he would receive from Martha Jeanette Smiley's Estate. A review of the testimony in this case reveals that Gary Lamar Smiley forwarded an e-mail dated May 25, 2006 to Donald E. Walsh (Ex P-5,RE-53). The last statement noted by a “dot” clearly indicates that Mr. Smiley had a complete understanding of Martha Jeanette Smiley's wishes. He testified he did not have such an understanding of the will until after August of 2006. This exhibit clearly indicates otherwise.

“Upon Martha Jeanette Smiley's death her Last Will and Testament will be executed leaving 50 acres and the home to Gary Lamar Smiley and *remaining property to family* (emphasis added), provided it was not needed for her care and sold prior to her death.”

**\*5** It is apparent that the trial court felt that Gary Lamar Smiley knew exactly what he would receive. Based on the deed and the other evidence, the Court was of the opinion that the timber located on the 90 acre tract of land was being held in **trust** for the remaining heirs.

The forester for the Appellees stated that the timber on the 90 acre parcel was cut up to a point about three (3) chains from the public road. The cut did not go to the road in an attempt to hide the fact the timber was being removed. When you couple all these factors together, it appears that Gary Lamar Smiley and his wife misused and abused their position of **trust** with Martha Jeanette Smiley.

There were funds that were misappropriated by Gary Lamar Smiley and Mary Ann Smiley. There was a separate checking account and savings account opened in their names that was funded by Martha Jeanette Smiley's money. A large amount of these funds were expended and not returned to the estate. The Court entered an appropriate Order for what it deemed to be misused funds.

## **\*6 SUMMARY OF ARGUMENT**

The Appellants appear to have filed their appeal dealing with four possible areas of error.

The initial issue is dealing with the Court's interpretation of the deed from Martha Jeanette Smiley to Gary Lamar and Mary Ann Smiley. The deed specifically proposes that the property is being held in **trust**. Further, there was testimony by the Appellants that the deed was being signed at the instruction of an **elder** care Lawyer, Mr. Ronald Morton, and it was prepared for Martha Jeanette Smiley's possible placement in a nursing home.

The second issue is the timber estimate provided by Mr. Andy Lewis. The argument is that Mr. Lewis used an incorrect line of demarcation between the two properties, being a 50 acre parcel and a 90 acre parcel (Ex P-29, RE-59). Mr. Lewis was questioned about this issue and stated that he had began his initial investigation to determine the location of the line on the Northeast corner of the Smiley property. He further stated there was flagging along the West line of the 50 acre tract of land. This line traveled in a southerly direction from a public road to a creek that traverses the property. A survey was later ordered. After the survey was completed, Mr. Lewis made a trip to the property to compare his first line and the survey line. He found little if no difference.

Eddie Franklin, who was a defendant in this case, testified; however, he has no expertise in the area of forestry. He did cut the timber, but he was not the only person to remove timber from \*7 the property. Further, he testified he cut the timber at the direction of Gary Lamar Smiley and that a clear cut was not necessary. Testimony also indicated that Mary Ann Smiley was aware of and involved with the timber removal.

The Court had to weigh all the facts and then determine whether or not to apply the [MS Code Section 95-5-10](#). In a review of the circumstances, it appears that Gary Lamar Smiley and Mary Ann Smiley abused their position of **trust**, as they well knew how the property would pass, and made an attempt to hide the removal of the timber. The Court, taking these facts into account, made the decision to apply the statute.

The final issue is the abuse of funds that were actually the monies of Martha Jeanette Smiley. Ms. Smiley was of advanced age. A simple review of the examination of Mary Ann Smiley indicated money being forwarded to a business owned by Mary Ann Smiley, the purchase of a four wheeler, tractor and other abusive spending.

This is simple, Gary Lamar Smiley and Mary Ann Smiley abused their superior position by taking advantage of Martha Jeanette Smiley. Further, they abused the position of **trust** by clear cutting most of the timber on a 90 acre tract of land they knew would go to their kindred.

The Appellants have never accounted for all of the funds of Martha Jeanette Smiley.

## \*8 ARGUMENT AND AUTHORITIES

### ISSUE 1. Did the Court err in its' interpretation of the Warranty Deed in favor of Gary L. Smiley and Mary Ann Smiley?

The allegations of the Amended Complaint allege, among other things, that Gary Lamar Smiley and Mary Ann Smiley were holding the property in **trust** for the named beneficiaries, which include the Appellants. After hearing the evidence, the Court agreed and so ruled. The Court in this case had a specific Findings of Fact and Conclusions of Law. There are numerous cases in which the Supreme Court of this state has ruled that it will not disturb the findings of a Chancellor unless manifestly wrong. [Keenen Properties, L.L.C. and Sarah Elizabeth Keenen v. Robert B. Wilson, The Maurice G. Wilson Trust and Anderson-Tully Company](#), 912 So.2d 954 (Miss. 2005) quoting [Nichols v. Funderbuck](#), 883 So.2d 554, 556 (Miss. 2004).

In order to determine whether a constructive **trust** existed, the Court would have to determine the definition of a constructive **trust**. A constructive **trust** has been defined in several cases as follows:

“A constructive **trust** is one that arises by operation of law against by one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity of good conscience, either has obtained or holds the legal right to property, which he ought not, in equity and in good conscience, hold and enjoy.” [Saulsberr v. Saulsberr](#), 223 Miss. 684, 78 So.2d 758 (1955), [Davidson v. Davidson](#), 667 So.2d 616, 620 (Miss. 1995), [Joel v. Joel](#), 43 So.3d 424 (2010).

\*9 In [Joel v. Joel](#), 43 So.3d 424 (2010), the Court stated:

“So a constructive **trust** is a proper remedy in a variety of circumstances. The McNeil v. Hester definition provides several examples of wrongful conduct that may justify imposition of a constructive **trust**:

(1) fraud, actual or constructive

(2) duress

- (3) abuse of confidence
- (4) commission of wrong
- (5) any form of unconscionable conduct, artifice, concealment or questionable means
- (6) any way against equity in good conscience.

**Any of the conduct, by itself, in this disjunctive list will suffice.”** *McNeil v. Hester*, 753 So.2d 1057 (Miss. 2000); *Saulsberry v. Saulsberry*, 223 Miss 684, 690, 78 So.2d 758,760 (1955); citing *Alvarez v. Coleman*, 642 So.2d 361, 367 (Miss 1994); *Planters Bank & Trust Co. v. Sklar*, 555 So.2d at 1034 (Miss. 1990); *Sojourner v. Sojourner*, 153 So.2d 807 (1963)

It was the Courts' finding and the Appellees' position that Gary Lamar Smiley and Mary Ann Smiley abused the confidence placed in them by Martha Jeanette Smiley.

It is clear that Martha Jeanette Smiley intended the property that was named within the deed to be held in **trust** and to pass under the terms and provisions of her Last Will and Testament. This Last Will and Testament attempted to give a specific boundary and location of the 50 acre tract of land. It further states the names of the remaining heirs. The will provided how the land would pass and approximately how much land these heirs would receive. There are also restrictions on all parties as to the steps that must be followed to sell the land. This would apply to any part of the real property, which would include timber. All of these provisions are noted within paragraph II, a, b and d of the \*10 Last Will and Testament of Martha Jeanette Smiley It is interesting to note that Ms. Smiley stated in her Last Will and Testament on the 14th day of October, 2004, under paragraph V, that she still owned certain property in Pointe Coupe Parish, Louisiana (Ex P-1,RE-37). The testimony indicates that this property was later conveyed to Gary Lamar Smiley.

Gary Lamar Smiley moved in with Ms. Martha Jeanette Smiley sometime in the later part of 2004. After reviewing the testimony, it is apparent that his wife moved into the home sometime during the month of January, 2005. What is interesting, is that Martha Jeanette Smiley, according to the testimony, had a long standing will. Immediately following the time that Gary Lamar Smiley and Mary Ann Smiley moved into the home of Martha Jeanette Smiley, the following documents were generated:

- 1) The Last Will and Testament dated October 2004 (Ex P-1,RE-37).
- 2) A Durable General Power of Attorney dated the 23rd day of May, 2005, in favor of Gary L. Smiley and Mary Ann Smiley (Ex P-2,RE-42).
- 3) On the 28th day of November, 2005, the deed that is subject of this suit, (Ex P-4,RE-52), was signed by Martha Jeanette Smiley in favor of Gary Lamar Smiley and Mary Ann Smiley, thereby conveying the entire 140 acres of land that the paragraph in question quotes as follows:

“This conveyance is executed **trusting** that Gary Lamar Smiley will follow the dictates of my Last Will and \*11 Testament with regard to the disposition of the above described property. In the event however that Gary Lamar Smiley should predecease me, then, in that event his executor or administrator shall then follow my dictates and dispose of said property in accordance with my Last Will and Testament.”

It is clear that the conveyance was made **trusting** that Gary Lamar Smiley would follow the dictates of her Last Will and Testament.

**4) A General Power of Attorney executed by Martha Jeanette Smiley in favor of Gary Lamar Smiley and Mary Ann Smiley being dated the 28th day of November, 2005, (Ex P-3,RE-45).**

By the end of November, 2005, being a period of time less than one (1) year, all real property that was owned by Martha Jeanette Smiley, had been transferred subject to the restriction to Gary Lamar Smiley and wife, Mary Ann Smiley. Further, Martha Jeanette Smiley had so much **trust** and faith in Gary Lamar Smiley and Mary Ann Smiley, that she had executed and signed two (2) separate Powers of Attorney in their favor.

A party, who is appointed as an agent and attorney in fact, has been placed in a high position of **trust** by the party, who is appointing the individual to act in this capacity. This position places the party in a fiduciary relationship and places a high standard on the agent. You are now acting on behalf of an individual, who has entrusted you with this authority. In time, by accepting this position, the agent and attorney in fact will or **\*12** should comply with an agreement for an accounting without question. Like it or not, you are now in a fiduciary relationship with the party giving you this authority.

The Appellees would submit that the actions of Gary Lamar Smiley and wife, Mary Ann Smiley, at the least, were an abuse of confidence. Further, the conduct of Mary Ann Smiley and Gary Lamar Smiley was unconscionable and paramount to fraud. All of these aspects fit the definition that would allow the Court to impose a constructive **trust**.

The Court should further note, that during this time span and into early 2006, all monies that were in the name of Martha Jeanette Smiley were transferred to accounts under the control of Gary Lamar Smiley and Mary Ann Smiley. These accounts will be specifically discussed in the last section of this argument, dealing with the misuse of funds belonging to Martha Jeanette Smiley.

**\*13 ISSUE 2. Did the Court err in its' determination of the timber harvested?**

The Appellant in this case is attempting to cloud the correct testimony.

Andy Lewis is a licensed registered forester with the State of Mississippi. He was presented two (2) maps to give him an idea of where the property was located and its boundaries (Ex P-22A,RE-57, P-22B, RE-58). The Appellants are attempting to confuse the Court with measurements provided on map P-22B. In a review of this map and of the testimony, Andy Lewis testified he started from the Northeast corner of the Smiley property (T-93,RE-23). The hand drawn map indicates a distance of 1110.00 feet from the Northeast corner to the dividing line. His testimony further indicates that there was an old flagging and that appeared to separate the two properties. That everything East of this line was on the 50 acre tract and was select cut (T-55,RE-16). He confirmed this line after the survey of David Cothren was completed (Ex P-29,RE-59). Mr. Lewis' testimony confirmed the line to be the same (T-59-60-61,RE-19-21). Therefore, the North\South line that separates the two properties is in the same location and is not 320 feet off.

What is interesting is Mr. Lewis' testimony that there was old flagging located along the line that separated the two tracts. Further, that the survey line was at or near the old marks. Gary L. Smiley admitted that he had placed the initial marks along the line (T-297,RE-27). Evidently these marks were used to separate the two **\*14** tracts of land and by doing so, the 50 acre tract to be owned by Gary and Mary Ann Smiley was select cut. All property West of the line was clear cut with the exception of a small parcel on the North end near the road.

The Appellants made every attempt to conceal the cut. Mr. Lewis testified that there was a strip of timber left between the road and clear cut, being about three (3) chains wide (T-58-59,RE-17-18). This provided a buffer between the public road and the clear cut.

The volume and value of the timber is particularly noted in Exhibit P-25 and P-27. Mr. Lewis testified, as shown in Exhibit P-25, as to the value the landowner would have received. This is not the delivered value (T-68,RE-22). He further explained



the difference between the delivered value and the net value paid to the land owner (T-68,RE-22). The delivered value would be as the timber stood in the forest with no reduction for cutting and hauling. This is the standard for damages.

The case of *Masonite Corp v. Williamson*, 404 So.2nd 565 (1981), does define the measure of damages for the conversion of timber.

“Measure of damages in an action for conversion is value of the property at the time and place of its conversion; under this rule the delivered value is appropriate measure of damages.”

The increase in value from Exhibit P-25 compared to Exhibit P-27 is fully explained. Exhibit P-25 is the value that the \*15 landowner would have received. Exhibit P-27 is the delivered value. Exhibit P-27 also provided a better calculation in that Mr. Lewis was provided the values of the timber by reviewing the prices actually received. These figures were provided by Buffalo Wood Land and Timber in Exhibit P-26. The volumes provided by Mr. Lewis did not change.

One of the most important aspects is that Mr. Gary Lamar Smiley states that the timber had pine beetles. In a review of Exhibits P-25 and P-27, which contain the same volumes, any person can see that the bulk of the tract of timber was hardwood. Testimony revealed that pine beetles do not attack hardwood.

The testimony of Mr. Lewis is clear and his calculations are accurate and un rebutted.

**\*16 ISSUE 3. Did the Court err by applying the damages provided in Section 95-5-10 of the MS Code of 1972, Annotated?**

The first thing that the Appellees would point out to the Court is the email Gary Lamar Smiley sent to Donald E. Walsh long before the death of Martha Jeanette Smiley (Ex P-5,RE-53). In a review of the email dated May 25, 2006, Mr. Smiley states in paragraph three (3) by the third dot as follows:

“Upon M.J. Smileys death her last will and testament will be executed leaving 50 acres and home to Gary Smiley and remaining property family, provided it was not needed for her care and sold prior to her death.”

He plainly knew what he was going to get and what the remaining heirs would receive. In spite of this, he clear cut the 90 acres of timber and kept all of the money. This is a violation of the will and deed. His wife knew of the cut and both of them accepted the proceeds from the cut and they have now spent the money. None of this money was returned to the estate. This is a good reason why the terms of MS Code Section 95-5-10 should apply.

The Appellant is quick to point out the case of *Fly Timber Company, Inc v. Waldo*, 758 So.2nd 1067 (2000). This case stands for the premise that if one co-tenant gives permission to cut and remove timber from a tract of land, it would free the person or entity from the terms and provisions of MS Code Section 95-5-10. Gary Lamar Smiley and wife, Mary Ann Smiley, were not the owners of said property. Further, they were not co-tenants. So the question would be, did they have permission to cut the timber from any of the remaining co-tenants. A specific question about the remaining \*17 co-tenants was posed to Gary Lamar Smiley (T-302-303, RE-28-29). The line of questioning was specifically pointed to each heir. Mr. Smiley responded that he had not talked to any heirs to seek his/her permission to cut the timber. This question was also presented to Mary Ann Smiley, who testified that no heirs were contacted (T 315-316,RE-30-31).

Unfortunately, Don Walsh died in the Spring of 2007. The only evidence we have that he was aware of the type of cut is a letter to Linda Toler (Ex P-31,RE-60-61). It is believed that each heir received a copy of this letter. His letter indicates that the timber being removed is bug timber only. Again, this would only affect the pine. The letter clearly states that the timber would belong to the estate, which consists of the heirs named in the will. Paragraph three (3) recites:

“If the estate is without sufficient funds to take care of the expenses, the timber will be cut to the extent necessary to take care of these expenses.”

A definite indication to anyone reading the letter is that the estate would own the timber and all proceeds related to the cutting of the timber. Gary Lamar Smiley got a copy of this letter as indicated in his testimony (T-205-206,RE-24-25). Mr. Smiley still insist during his testimony that he thought he owned the property. His email and the letter of Don Walsh would indicate otherwise (Ex P-5,RE-53) (Ex P-31, RE-60-61). The bottom line is that Gary Lamar Smiley and Mary Ann Smiley cut the timber and kept the money in spite of all indications they knew better. Apparently, this cut \*18 was misrepresented to Mr. Walsh. Also, there was a blatant attempt to hide the cut by leaving a strip of timber approximately three (3) chains in width along the public roadway.

Exhibit P-27 indicates Loblolly pine was valued at \$16,753.25 and pine pulpwood \$1,800.93. These two combined would be \$18,554.18. The total cut was \$178,223.50, so the percentage of pine cut was 10 percent of the entire cut on the 90 acre tract. These same percentages are noted in Exhibit P-25. This timber did not have to be cut. The testimony of Eddie Franklin was that he was to buy some timber around the house. His opinion was that twelve (12) to fifteen (15) percent of the timber was damaged. Further, that twenty-five (25) percent of the pine stand was bug infested

In this case, Mississippi applies joint and several liability. Also good faith is not a defense, [Moorehead v. Hudson, 888 So.2d 459 \(Miss 2004\)](#). If the Court was to apply comparative negligence, the question to be answered would be who caused the timber to be cut. In that event, Gary Lamar Smiley and Mary Ann Smiley would be 100% responsible. However, comparative negligence is not applicable in this case.

Gary Lamar Smiley and Mary Ann Smiley violated the terms of the deed, violated the terms of the will and then put the money in their pocket and did not turn it over to the estate. All the Court has to do is look at their overall handling of this property and the money of Martha Jeanette Smiley. It is easy to see that these \*19 people had malicious intent to take all they could get and spend it, without any accounting. Clearly, they misrepresented what they were doing to Don Walsh and made all attempts to misrepresent their actions to the Court. They lied to the Court by attempting to cover their tracks. The Court appropriately reviewed the totality of the circumstances and properly applied [MS. Code Section 95-5-10](#).

The Court in its' ruling did take into account the money that was paid to the plaintiffs by other defendants and reduced the judgement accordingly.

#### **\*20 ISSUE 4: Did the Court err in determining the misuse of funds belonging to Martha Jeanette Smiley?**

To keep matters in a time sequence, sometime after the last Power of Attorney and deed was signed in favor of Gary Lamar Smiley and Mary Ann Smiley, the banking accounts began to change. There were two main accounts opened in the name of Gary L. Smiley and Mary Ann Smiley. Martha Jeanette Smiley's name did not appear on either of these accounts.

Account one (1) was a savings account. Account two (2) was a checking account noted in Exhibit P-20. The savings account was not introduced because all funds in question passed to the checking account. Exhibit P-20, the checking account, is the account in which the bulk of the funds were deposited. It appears from cross-examination that all of these funds were exhausted and none of these funds were returned to the estate. Further, Mary Ann Smiley wrote the bulk of the checks. The account speaks for itself and the majority of the expenditures were made on behalf of Gary and Mary Ann Smiley.

The checking account was titled “Gary L. Smiley and Mary W. Smiley, Special Account” Exhibit P-20, P2. Upon cross-examination of Gary L. Smiley and Mary Ann Smiley, the parties indicated that they opened this account in order to avoid questions with Medicaid and/or Medicare. Further, this was under the instruction of an **elder** care lawyer, Mr. Ronald Morton.



The initial deposit in the account was \$6,754.81, Exhibit P-20,P2. There is no disagreement \*21 that the larger deposits were made with monies that belonged to Martha Jeanette Smiley.

The deposits made from funds of Martha Jeanette Smiley are as follows, Exhibit 20:

Page 2	11/9/05	\$ 6,754.81	
*Page 9	1/19/06		\$ 3,000.00
Page 11	1/27/06	14,855.85	
Page 19	2/14/06	19,798.87	
Page 32	3/13/06	12,399.83	
*Page 35	3/24/06		10,000.00
*Page 48	4/17/06		6,000.00
Page 51(Carpet)	4/25/06		3,000.00
*Page 58	5/9/06		3,000.00
Subtotal		\$53,809.36	25,000.00

\*Denotes known transfers from the Smiley Special Savings Account to the Checking. Each transfer has a notation "Xfer United SA".

The Smiley Special Savings Account was completely funded by Martha Jeanette Smiley's money.

There was also an oil and gas lease for \$5,670.00 (Exhibit P-21).

Oil Lease	5,670.00
Transfers denoted from her money (CD's, Savings, etc.)	59,479.36
Plus known transfers from the savings (Funded by Martha Jeanette Smiley's money)	25,000.00
TOTAL	\$84,479.36

\*22 It is undisputed that Martha Jeanette Smiley was the owner of these funds.

There was a second account (Ex P-7,RE-54). There were monthly deposits of \$930.28, being Martha Jeanette Smiley's retirement and social security. The Court should note that on January 1, 2005, the balance in this account was \$26,639.99 (Ex P-7,RE-55). The last statement, immediately following the death of Martha Jeanette Smiley, is July 7, 2006 (Ex P-7,RE-56). The Court should note that the this statement indicated a balance of \$376.92. From January 13, 2005 until July 14, 2006, this account was reduced by \$26,263.07.

The Appellees would show that immediately thereafter, there was an attempt to co-mingle funds with this account, being payroll checks payable to Gary Lamar Smiley. It further appears that several small deposits were made by Mary Ann Smiley. Gary

Lamar Smiley and Mary Ann Smiley treated this account as their personal account when the larger sums of money being deposited were the funds of Martha Jeanette Smiley.

Gary Lamar Smiley and Mary Ann Smiley were duly appointed agents and attorneys-in-fact for Martha Jeanette Smiley. They also state they were advised to create these accounts by Mr. Ronald Morton, whom they refer to as the **elder** care attorney. Why would they co-mingle their funds with those of Martha Jeanette Smiley unless they had bad intentions from the beginning?

**\*23** There are numerous expenditures made by Gary L. Smiley and Mary Ann Smiley that are unexplainable (Ex P-20).

Pg 3 Counter check to "Sugar Bears"	11/11/05	\$ 2,500.00
Pg 7 Counter check to "Cash"	12/6/05	2,000.00
Pg 7 Check #1002 to "Sugar Bears"	12/12/05	400.00
Pg 8 Check #1007 to "Cash"	12/20/05	1,100.00
Pg 8 Check #1014 to "Cash"	1/3/06	350.00
Pg 13 Check #1016 to "Sugar Bears"	1/6/06	150.00
Pg 14 Check #1021 to "Sugar Bears"	1/15/06	100.00
Pg 14 Check #1027 to "Sugar Bears"	1/19/06	2,700.00
Pg 15 Check #1032 to "Sugar Bears"	1/27/06	300.00
Pg 15 Check #1035 to "Cash"	1/29/06	300.00
Pg 16 Check #1044 to "Daniel ____"	1/31/06	250.00
Pg 16 Check #1049 to "Tammy McKey" for Mary Kay	2/2/06	269.90
Pg 25 Check #1038 to "Pine Hills CC"	2/1/06	300.00
Pg 25 Check #1031 to "Steve Roberts, Atty"	1/25/06	250.00
Pg 26 Check #1051 to "Cash"	2/6/06	400.00
Pg 26 Check #1053 to "Sugar Bears"	2/6/06	400.00
Pg 26 Check #1052 to "Sugar Bears"	2/6/06	600.00
Pg 28 Check #1072 to "Cash"	2/18/06	310.00
Pg 29 Check #1082 to "H and H"	2/18/06	1,196.79
Pg 29 Check #1122 to "H and H"	2/22/06	1,570.76
Pg 39 Check #1089 to "Sugar Bears"	2/8/06	800.00
Pg 40 Check #1099 to "Cash"	3/25/06	500.00
Pg 41 Check #1133 to "Bargain Furniture"	3/13/06	4,855.00

Pg 42 Check #1134 to "Bargain Furniture"	3/13/06	240.71
Pg 42 Check #1138 to "Sugar Bears"	3/17/06	2,000.00
Pg 42 Check #1141 to "Sugar Bears"	3/23/06	500.00
Pg 33 EFT to "Liberty Tractor"	3/15/06	7,224.64
Pg 36 Mortgage Payment	4/3/06	1,672.00

\* H and H is a hardware store. Sugar Bears was business owned by Mary Ann Smiley.

**\*24** I believe the Court gets the picture. There are simply too many unexplained transactions. There are numerous transactions that are noted within the records, which also indicate the purchase of a tractor, four wheeler and furniture for the Court's information.

When asked about the ownership of the tractor, four wheeler and furniture, Mary Ann Smiley testified that they were titled in her and Gary's name and that they own these items.

There is no explanation as to where these funds went. The only explanation offered to the Court is that these funds were paid over to Don Walsh. It is evident that there were no checks from this account at any point in time that would show or indicate that any payment was made to Don Walsh. It is the position of the Appellees in this case that the defendants have been unable to account for the funds and the defendants have misappropriated \$110,742.43 from Martha Jeanette Smiley, which included contributions to Sugar Bears, cash payments, tractors, lawn mower, **\*25** four wheelers and anything except for the use and benefit of Martha Jeanette Smiley.

Cross-examination of the defendants indicated that there was a misrepresentation by the defendants for not accounting for all funds that were deposited, Exhibit D-7. Further, that there was a misrepresentation to the court concerning the sitters and the amount of time that the sitters had been with Martha Jeanette Smiley. Basically, a total of 2,770 hours had been paid for sitters. During the cross-examination of Mary Ann Smiley the hours simply did not add up. If sitters had been sitting with Mrs. Smiley twenty-four hours a day, this would have equaled a time in excess of sixteen (16) weeks. The testimony did not confirm this position. The trial court reviewed the testimony and gave credit for the hours that were presented by testimony (T 147-150,RE-32-35).

In reviewing the testimony, it is crystal clear that Gary Lamar Smiley and Mary Ann Smiley abused their position and misappropriated the funds allotted by the trial court on the Final Order. (CP 77-90,RE-1-14).

One of the most interesting things about the testimony is an excerpt from the cross-examination of Mr. Gary Lamar Smiley (T-232-RE-26)

Line 8 Q: And you knew you were going to get that house; didn't you?

Line 10 A: If she didn't change things, yes, sir.

**\*26** Line 11 Q: Okay. And by the time she got in the nursing home in April, you sure didn't expect her to change anything; did you?

Line 14 A: That was still her prerogative.

Also on cross-examination of Mary Ann Smiley (T-155, RE-36) :

Line 12 Q: Okay. The refrigerator and freezer had gone out. I also see one to H and H Lumber 11/22 - I want to remind you this is your house by now. You understand that you're supposed to have a deed to this and y'all claimed you owned it, correct?

Line 17 A: Yes, sir, but it was always with the understanding that it was still Jeanette's. The reason that was basically done was to protect everyone. All of the nieces and nephews should the event come that Jeanette had to be placed in a nursing home - we did it under the advice of the attorney.

The testimony reflects that Martha Jeanette Smiley was still the one in control and that she had the prerogative to change her mine.

Mary Ann Smiley's testimony directly states that everything that was done, was to protect everyone, including the nieces and nephews.

At this juncture, how could anyone say anything other than the land and money were being held in **trust**.

### **\*27 CONCLUSION**

This entire case stems around the interpretation of the deed to Gary Lamar Smiley and Mary Ann Smiley. The deed specifically uses the word "**trusting**". The complete verbiage states that Gary L. Smiley would follow the dictates of the Last Will and Testament of Martha Jeanette Smiley.

The Court had **trusting** in quotation so that it would lend credence to the fact that Gary Lamar Smiley and Mary Ann Smiley were holding the property in **trust**. Gary Lamar Smiley knew exactly all the details as to what he was going to get at the time Martha Jeanette Smiley passed. Further, the testimony of Gary Lamar Smiley and Mary Ann Smiley indicates that Martha Jeanette Smiley was still in control of the property and that everything they did was for the benefit of all nieces and nephews. There is no way that the Appellants can now argue that they believed they owned all of the property. For lack of a better word, this is all bull, and the Chancellor could plainly see through their position. The Court properly found that a constructive **trust** existed. The evidence is clear and convincing in this case.

In applying [MS Code Section 95-5-10](#), the trial court carefully reviewed the testimony and exhibits. The testimony of Andy Lewis was clear and concise. He did a one hundred (100%) percent timber cruise of the cut area. He doubled checked the boundaries and found them to be the same. His testimony indicates a select cut of timber located on the parcel of land that was to pass to Gary Lamar **\*28** Smiley and Mary Ann Smiley. The ninety (90) acre tract was clear cut, less the area left in an attempt to disguise the cut.

Now the Appellants would attempt to convince this Court that they were co-tenants with the remaining heirs. The answer to this position is no. There were not co-tenants. At best they were holding the property in **trust** for the heirs.

The Appellees have previously argued the issue in the [Fly Timber Co, Inc. v Waldo, 758 So.2nd 1067 \(Miss. App. 2000\)](#), which quotes [Bollinger-Franklin Lumber Co. v. Tullos, 124 Miss 855, 87 So. 486 \(1921\)](#). A review of these two cases are necessary.

In the *Bollinger* case, the Court stated that it is incumbent on the defendant to make a proper objection of non-joinder of a possible plaintiff. The defendants made no such objection. Further there was no affirmative defense to this effect raised by the defendants/Appellants. The Court further recites:

"A defendant, if he so desires, may waive the non-joinder as a ground for defeating the action and take advantage of it at trial to the extent of limiting the plaintiff's recovery to a proportionate part of the damages suffered."

This is what happened in this case.

The *Bollinger* case further provided that the plaintiff should allege that joint owners or tenants in common did not give permission to cut and then prove that none of the co-tenants gave permission (CP-20, RE-15). The allegation must be made and proof must be presented showing the Appellees met both of these requirements. None of the co-tenants or tenants in common gave \*29 permission because they were never asked. Specific questions were addressed to Gary Lamar Smiley and Mary Ann Smiley and each stated that none of the heirs were contacted about the cutting and removal of the timber. The persons, who made the determination to cut, were Gary Lamar Smiley and Mary Ann Smiley and no one else. If the Court applies the principles set out in *Fly* and *Bollinger*, the plaintiffs/Appellees did meet their burden of proof.

There is no disagreement in the fact that the appropriate way to determine the value of the timber is as stated by the Appellants. This being the value of the standing trees unenhanced by any labor of the trespasser.

It is evident that timber trespassing does not fall under the comparative negligence statute. [MS Code Section 85-5-7](#) was adopted and made effective July 1, 1989. The case of [Moorehead v. Hudson, 888 So.2d 459 \(Miss 2004\)](#), was decided in 2004. The question in this case dealt with a timber trespass. The case was reversed and remanded for proceedings consistent with the opinion. The opinion found that a timber company involved in the cutting and removing of timber should be held jointly liable for its' actions. Also, if this statute does apply, it would appear in [MS Code Section 85-5-7\(6\)](#) of the MS Code of 1972 would be the proper application.

The proof of misappropriation of funds is extensive and complete. The Chancellor reviewed the expenditures and found the monies of Martha Jeanette Smiley had been improperly expended.

\*30 The Court should look at the totality of the circumstances in this case. Gary Lamar Smiley and Mary Ann Smiley, within eighteen (18) months, attempted to have total control of all assets of Martha Jeanette Smiley. The trial Court reviewed this case in detail and the opinion is one that should stand.

Therefore, the ruling of the trial Court should be affirmed.